National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 30, 1998

TO: Ralph R. Tremain, Regional Director, Region 14

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Day Transfer Co. d/b/a Day Moving Transfer and Storage Company, Case 14-CA-25103

530-4080-5012-6700

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by withdrawing recognition from the Union on the ground that the Union had lost majority status.

FACTS

The Employer and the Union had been parties to a long-term collective bargaining relationship, based on the Employer's voluntary recognition of the Union. The most recent contract expired on March 20, 1998.

On March 23, 1998,[(1)] Smith filed a petition in Case 14-RD-1612. Smith, the Employer, and the Union entered into a Stipulated Election Agreement providing for mail balloting to commence on April 20. The Excelsior list contained the names of two employees, Randall Smith and William Lashley. On April 14, the Employer notified the Region that Lashley had died on April 6. In addition to confirming Lashley's death, the Union then claimed that the Excelsior list should have included two additional employees, the sons-in-law of the Employer's president. The Employer asserted that the sons-in-law should not be included in the unit and would not state whether Lashley would be replaced. On April 28, the Region canceled the election, revoked approval of the Stipulated Election Agreement, and issued a Notice of Hearing to resolve the unit questions concerning the placement of the sons-in-law and whether the unit had permanently contracted to one person, thus rendering it inappropriate.

On May 1, the Employer notified the Union that it was withdrawing recognition, claiming it had objective considerations that the Union not only failed to represent a majority of employees but, in fact, represented no employees. The Employer relies on a copy of an April 16 letter that Smith sent to the Employer as well as to the Region, stating that he would have voted to "dissolve union representation" had the election been held as scheduled, and upon asserted statements by the Employer's sons-in-law that they would do whatever it took to get rid of the Union.

The Union does not allege that the Employer otherwise violated the Act.

ACTION

The Region should dismiss the charge, absent withdrawal, and process the RD petition.

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of the certification year or a contract, an employer may withdraw recognition if either the union has in fact lost majority support, or the employer has a good-faith doubt of the union's majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations.[(2)]

In Chelsea Industries,[(3)] the General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "good faith" doubt standard should be overturned. The General Counsel argued that the Celanese rule encourages employers to engage in self-help measures which undermine

the Supreme Court's view that, "even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief."[(4)] Thus, the General Counsel argued that a secret-ballot election should be the only means by which a Section 9(a) representative's presumption of majority status can be rebutted.

We conclude that it would not be appropriate in this case to issue complaint solely on the General Counsel's alternate theory in Chelsea Industries, particularly in view of the Board's recent pronouncement in Auciello. The Employer here had knowledge of the loss of majority status, regardless of the number of employees ultimately found to be in the unit,[(5)] and the Board currently permits an employer to withdraw recognition on this basis. Thus, there is no argument under current Board law supporting a violation. Furthermore, retroactive application of any new rule of law announced in Chelsea would be uncertain. Thus, under the law as it now stands, this case should be disposed of in accord with the long standing practice of General Counsels to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year or after expiration of a contract in circumstances where the union has in fact lost majority status among unit employees without any unlawful interference by the employer.[(6)]

Accordingly, the Region should dismiss this Section 8(a)(5) charge, absent withdrawal. Further, consistent with the General Counsel's position in Chelsea Industries, the Region should resume processing the RD petition, including resolving the unit placement issues relevant to Case 9-RD-1858.

B.J.K.

---

[1] All subsequent events occurred in 1998.

[2] This principle was recently noted by the Board in Auciello Iron Works, 317 NLRB 364 (1995), on remand from 980 F.2d 804 (1st Cir. 1992).

[3] Cases 7-CA-36846 et al.

[4] Brooks v. NLRB, 348 U.S. 96, 104 n.18 (1954). See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987) (allowing employers to rely on employees' rights in refusing to bargain is inimical to industrial peace) (dictum).

[5] The Region might make any of the following unit determinations: (a) the unit consists of only one employee (Smith); (b) the unit consists of two employees (Smith and Lashley's replacement); (c) the unit consists of three employees (Smith and the two sons-in-law); the unit consists of four employees (Smith, Lashley's replacement, and the two sons-in-law).

[6] See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.